IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 75 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?g

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RAJESHKUMAR JAYCHANDBHAI SHAH - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MR MB GANDHI for Appellant(s) : 1,
MS.PANDIT, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,
NOTICE SERVED for Opponent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 14/03/2007

ORAL JUDGMENT

Present appeal is filed against the order of conviction and sentence passed by the learned Special Judge, Mehsana in Essential Commodity Case No.1 of

1993, on 11th December, 1995 whereby the appellant-accused was sentenced to undergo three months rigorous imprisonment and was ordered to pay a fine of Rs.1,000/-, in default thereof, to undergo 15 days simple imprisonment.

2. The prosecution case in nutshell is that present appellant-accused was running the shop of edible oil in the name and style of 'Rajendra Trading Co.,' at Patan. The inspection was carried out by the Director, Office of the Civil Supply Department, Gandhinagar on 26/9/1994 and following irregularities were noticed by him.

i) Working hours was not indicated.

ii)Statements and stocks were not forwarded to the Mamlatdar.

iii)Stock of 48 tins of groundnut was found; whereas as per the Stock Register 50 tins of groundnut oil was on record. 02 tins of groundnut oil was found less. The purchase bill of the above 50 tins of groundnut oil was not produced.

iv)Two tins of rapeseed oil was found excess.

v) The accused had sold 50 tins to Ashish Trading Co., Patan but he has not produced any supportive evidence that from where he had purchased that 50 tins.

3. For the aforementioned irregularities, the appellant-accused was served with the notice alleging violation of conditions mentioned under Clause 16, 17, 23 and 24 of Gujarat Essential Articles (Licencing, Control and Stock Declaration) Order, 1981. As the reply submitted by the complainant was found not satisfactory, the Collector decided and passed the order to file a criminal case in the year 1992 i.e. after about 8 years against the appellant-accused.

4. On considering the evidence led by the prosecution, the learned Judge came to a conclusion that the prosecution has established the charges levelled against the appellant-accused beyond doubt and convicted the accused-appellant for the said offence by the impugned judgment dated 11th December, 1995 passed in Special (Essential Commodity) Case No.1 of 1993. It is this judgment and order that has

given rise to this appeal.

5. Record and proceedings are before the Court and I have been taken through the same by both the sides during the course of hearing, mainly by reading the evidence recorded during trial.

6. After some deliberation, Mr.Gandhi has submitted that in light of the certain admissions made by the accused when he was facing department proceedings before Civil Supply and before the Collector, the present appellant-accused is not interested in pressing the appeal on merits so far as order of conviction recorded by the learned trial Judge is concerned but the appellant-accused should be heard on the point of quantum of punishment. Even on the date of judgment, the learned Judge could have granted the benefit of the Probation of Offenders Act or under the provisions of Section 360 of the Code of Criminal Procedure, considering the ratio of the Hon'ble Apex Court decision in case of **Ghanshyam Das Vs. Municipal Corporation of Delhi, reported in A.I.R. 1975 SC 845.**

7. Mr.Gandhi, has drawn attention of this Court to a decision of this Court in case of **(The) State of Gujarat Vs. Ganpatbhai Premjibhai Joshi, reported in 1998 (2) G.L.H. 787** where similar question had cropped up before this Court and while answering to this question and dealing with the grievance raised by the State the Hon'ble Court has observed thus:

> ***"4. In the decision reported in AIR 1975 SC 845, almost similar situation was dealt with by Their Lordship and it was a case under the Prevention of Food Adulteration Act and the benefit was decided to be given.***
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> ***5. Here also, it may be seen that 1958 Enactment whereby the formal expression of the legislative will to grant benefit of probation was clarified and expressed and in no uncertain terms, for the Enactments which were already on the Statute Book, necessary, reference has been made in Section 18 to exclude them. Essential Commodities Act, 1958 is not one of the Statues referred Commodities Act was very much in force at the time when said Probation of Offenders Act, 1958 came to be enacted, the Parliament, in its wisdom, has chosen not to exclude it.***
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> ***6. Under the circumstances, even the provision for minimum punishment will not come in the way because benefit of probation has to be given to***

the offenders under the provisions of Indian Penal Code as well as under the provisions of all other Statutes providing for penal offences unless they are specifically excluded either in the Statute itself or under the provisions of the said Probation of Offenders Act. This being not the position in relation to the offences under Essential Commodities Act, obviously, the decision taken by the Ld. Spl. Judge cannot be said to be, in any manner, wrong."

8. In the cited case, the Court was dealing with the legality and validity of the order of the learned Special Judge, who had granted the benefit of the Probation of Offenders Act to the appellant-accused found guilty of the charge of the offence punishable under the provisions of Essential Commodity Act.

9. Mr.Gandhi, in support of his argument has also placed reliance to one judgment in case of **Harivallabha and Another Vs. State of Madhya Pradesh, reported in (2005) 10 S.C.C. 330**. He has submitted that in this cited decision the accused was given benefit of Section 360 read with Section 361 of Criminal Procedure Code instead of serving substantive sentence. It would be proper to reproduce

the relevant paragraphs of this judgment.

> ***"3. Learned Counsel appearing on behalf of the appellants submitted that the appellants are first offenders and in the facts and circumstances of the case they should have been dealt with under the provisions of Section 360 of the Code of Criminal Procedure, 1973 (for short "the Code") and the High Court reduced the sentence of imprisonment from three years to three months without recording any reasons, as required under Section 361 of the Code, which lays down that for special reasons to be recorded, a court can refuse to release a person on probation of good conduct under Section 360 of the Code. In our view, in the facts and circumstances of the present case, the appellants should have been dealt with under the provisions of Section 360 of the Code.***
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> ***4. Accordingly, the appeal is allowed in part and while upholding the conviction and sentence of fine awarded to the appellants, sentence of imprisonment awarded against them is set aside and the trial Court is directed to deal with them under the provisions of Section 360 of the Code. The appellants, who are on bail, are discharged from the liability of bail bonds."***

10. Mr.Gandhi has pointed that the Civil Supply Department has already recovered Rs.14,000/- from the appellant-accused, that is, value of the stock seized at the time of inspection made by the Civil Supply

Officer and the said amount has been confiscated to the State in the nature or by way of penalty. Though, the criminal prosecution is an independent proceedings but while deciding the quantum of punishment and / or granting the benefit of Section 360 read with Section 361 of the Code of Criminal Procedure, the Court can consider this aspect as an intervening circumstances. One of the intervening circumstances is that the appellant-accused has left this business of selling of edible oil since years and mainly after the crucial inspection made by the Civil Supply Officers and the finding recorded by the Collector.

11. It is rightly submitted by Mr.Gandhi that issue of presence of *"mens rea"* was otherwise required to be considered by the trial Court. The Apex Court in case of **Nathulal Vs. State of Madhya Pradesh, reported in A.I.R. 1966 S.C. 43 (VOL. 53 C12)**, has observed that even in cases under the Essential Commodity Act, (major decision), the prosecution should establish the existence of *mens rea* when the accused is found responsible for not maintaining stock register, etc. At least the trial

Court ought to have considered that whether the appellant-accused should be granted the benefit of provisions of Section 360 read with Section 361 of the Code of Criminal Procedure. Enough and reasonable force is found in this submission. In such or similar cases after about lapse of several years the accused may not ask to go to prison because the nature of allegation is neither black marketing nor overpricing. The accused was also not dealing with the fair price shop, so, stringent prohibitory law has not been violated only regulatory provisions were found infringed.

12. So, accepting the ratio the aforesaid decisions and mainly the decision of the Apex Court in case of Nathulal (Supra) and the background of the above stated facts, the Court is inclined to allow the appeal partly by enhancing the amount of fine.

13. Ms.Pandit, learned A.P.P., has submitted that normally the Court in an essential commodity case should not given the benefit of Probation of Offenders Act, but when the accused was not doing the business of running a fair price shop and has not been found doing black marketing or overpricing and

at the relevant point of time there was no shortage of edible oil, the Court while confirming the order of conviction may alter the punishment imposed by the learned trial Court in an appropriate legal way.

14. In view of aforesaid discussion and in the result, the present Criminal Appeal No.75 of 1996 is partly allowed. While confirming the judgment and order of conviction passed by the learned Special Judge, Mehsana in Essential Commodity Case No.1 of 1993, on 11th December, 1995, of course by enhancing the amount of fine imposed by the learned trial Court, the order of substantive sentence is hereby altered.

14.1 The amount of fine imposed by the trial Court is enhanced to Rs.6,000/-(Rupees Six Thousand Only). Over and above the amount of fine imposed by the trial Court and paid by the appellant-accused, the appellant-accused shall pay the remaining amount of fine i.e. Rs.5,000/-(Rupees Five Thousand Only) with the trial Court within 30 (thirty) days from the date of receipt of copy of the writ, failing which the trial Court shall issue non-bailable warrant for arrest of the appellant-accused and he will be liable to serve the sentence imposed upon him by the trial Court.

14.2 The appellant-accused is hereby directed to further execute the bond of Rs.5,000/- (Rupees Five Thousand Only) of good conduct with one surety of the like amount for a period of one year under the scheme of Section 360 read with Section 361 of Criminal Procedure Code, 1973 while paying the amount of fine. The appellant-accused shall execute the bond of good conduct before the concerned trial Court within a period of 30 (thirty) days from the date of receipt of the copy of this writ, failing which the trial Court shall issue non-bailable warrant for arrest of the appellant-accused and he will be liable to serve the sentence imposed upon him by the trial Court. The order of substantive sentence shall remain under suspension till the period of bond of good conduct i.e. for one year and shall become inoperative on completion of the period of one year.

14.3 The appellant-accused is also directed that in case of violation of any of the conditions of the bond of good conduct, the trial Court shall at liberty to issue warrant of arrest for serving the sentence imposed by the trial Court.

14.4 The Bail Bond executed by the appellant-accused shall stand discharged on the date on which the appellant-accused executes the bond of good conduct

before the trial Court. Order and Direction accordingly.

(C.K.BUCH, J.)

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